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January 9, 1939

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Mr. W. B. Lane
Special County Auditor
Carrizo Springs, Texas

Dear Sir:

Opinion No. 0-40

Your letter of January 5, 1939, addressed to Honorable Gerald C. Mann, Attorney General, requesting an opinion on chain stores, was duly received and has been referred to the writer for attention.

Your letter in regard to this question is as follows:

"I submit the following for your opinion: Is a store selling approximately 65% of its gross receipts in retail lumber and building materials subject to the chain store tax?"

"The balance of the gross receipts consist mainly of farm machinery, hardware, and harvesting supplies."

House Bill No. 16, p. 1539, Ch. 400, Acts 1935, 44th Leg., 1st Called Session, which is commonly known as the "chain store tax statute" requires that all persons operating "stores" and "mercantile establishments" pay certain license fees, the amount depending upon the number of stores operated.

In Section 7 of the Act, the term "store" is defined as follows:

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"The term 'store' as used in this Act shall be construed to mean and include any store or stores or any mercantile establishment or establishments not specifically exempted within this Act which are owned, operated, maintained, or controlled by the same person, agent, receiver, trustee, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold, at retail or wholesale."

In the recent case of *Hurt v. Cooper*, 130 Tex. 433, 110 S. W. (2d) 396, the Supreme Court of Texas held the entire act constitutional and indicated that this definition of the word "store" would control in construing the act. The court said:

"The statute having defined the word, we are not concerned with its usual meaning."

We think that the store you refer to in your letter is covered by the definition in Section 7, unless it is "specifically exempted" in some other part of the statute.

The exemptions are set out in Section 5 of the act, and the only part of Section 5 that could possibly be considered as applying to the store in question is that part which reads as follows:

"Provided that the terms, 'store, stores, mercantile establishment or mercantile establishments' wherever used in this act shall not include: wholesale and/or retail lumber and building material businesses engaged exclusively in the sale of lumber and building material; . . ."

If the word "exclusively" had not been used the store in question might come within this exemption. We think that by limiting the exemption to "businesses engaged exclusively" that it means a business that is "only" and "solely" engaged in "the sale of lumber and building material" and not in any other business,

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even though the other business be only a small per cent of the entire business. In the case of United Gas Fuel Co. v. Morley Oil & Gas Co., 102 W. Va. 374, 135 S. E. 399, the Supreme Court of Appeals of West Virginia said:

"Words are to be given their ordinary and popular meaning, unless they have acquired a peculiar significance. . . . The word 'exclusively' is synonymous with the words 'only' and 'solely'. It is a word of restriction and exclusion."

In 23 Corpus Juris 274, it is said:

"Exclusive. The word is derived from 'ex,' out, and 'cludere,' to shut, and precludes the idea of coexistence. In its usual and generally accepted sense, as given by lexicographers, and in the ordinary speech of the people it means possessed to the exclusion of others; . . .

"Exclusively. To the exclusion of all others; without admission of others to participation; in a manner to exclude."

In view of the wording of the statute and the authorities that have construed such words, our answer to your question is as follows: A store selling approximately 65% of its gross receipts in retail lumber and building materials, and the balance in farm machinery, hardware and harvesting supplies, is subject to and liable for the "chain store tax".

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Charles A. Rottsch*
Assistant

CCR-N

APPROVED:

Gerald H. Mann
ATTORNEY GENERAL OF TEXAS